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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 99

HAROLD EUGENE WENZLER, SR., and JOHN IMLAY,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

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Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Petitioners pray that a writ of certiorari issue to review the judgments of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, entered in the above-entitled case on October 30, 1962.

Opinions Below.

No opinions were delivered in the courts below.

Jurisdiction.

From judgments of conviction rendered by the Municipal Court of the Pasadena Judicial District in the County of Los Angeles, State of California, after a joint trial before a court sitting without a jury, petitioners duly prosecuted their respective appeals to the

Appellate Department of the Superior Court of the State of California for the County of Los Angeles. The judgments of affirmance by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles were dated and entered on October 30, 1962 [C. T. 14, 35].[1] Copies of the said judgments of affirmance are annexed hereto as Appendix A and Appendix B.

Due and timely petitions for rehearing, or in the alternative, for certification of the cases to the District Court of Appeal [C. T. 15-17] were denied on November 9, 1962 [C. T. 18, 36]. See, Calif. Penal Code 1471; Calif. Rules of Court, Appellate Rules, Rules on Transfer of Municipal and Justice Court of Appeals, Rule 63.

By the aforesaid denials of certification, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. Calif. Constitution, Article VI, §§4, 4b, 4e, 5; Calif. Penal Code 1471; Calif. Rules of Court, Appellate Rules, Rules on Transfer of Municipal and Justice Court of Appeals, Rule 61, *et seq*; *Smith v. California*, 361 U. S. 147, 148, fn. 2; *Virginia Ry. Co. v. Mullins*, 271 U. S. 220, 222; *American Railway Express Co. v. Levee*, 263 U. S. 19, 20-21.

By order of Mr. Justice Brennan dated December 18, 1962, the aforesaid judgments of conviction were stayed pending the timely filing and disposition of a petition for writ of certiorari. By order of Mr. Justice

[1] The reference "C. T." is to the transcript of the record prepared and certified by the clerk of the court below.

Douglas dated January 29, 1963, the time to file this petition for writ of certiorari was extended to and including April 4, 1963.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) since the validity of a state statute on grounds of repugnancy to the Constitution of the United States was and is drawn in question and rights, privileges and immunities were and are specially set up and claimed under the Constitution of the United States.

Questions Presented.

1. Whether the construction of California Penal Code 311 and 311.2 as applied to petitioners, to mean that the prosecution is not required under the obscenity statute to prove that the film in question goes beyond customary limits of candor in description or representation of sex or nudity, and that accused alone have the burden to prove that the film does not exceed contemporary community standards, violates the free speech and press and due process provisions of the First and Fourteenth Amendments.

2. Whether the construction of California Penal Code 311 and 311.2, as applied to petitioners, to refuse petitioners the right to prove that the film in question does not exceed contemporary community standards by conceded competent evidence showing that comparable films have been exhibited in the same community at the same theatre with permission from an official Review Board of the community authorized by law to grant such permission, violates the free speech and press and due process provisions of the First and Fourteenth Amendments.

3. Whether the construction of California Penal Code 311 and 311.2, as applied to petitioners, to permit petitioners' convictions without competent evidence that the film in question exceeds customary limits of candor in description or representation of sex or nudity, the only competent evidence showing that the film does not exceed such limits, violates the free speech and press and due process provisions of the First and Fourteenth Amendments.

4. Whether the construction of Penal Code 311 and 311.2, as applied to petitioners, to punish the sale of the film in question as obscene, violates the free speech and press and due process provisions of the First and Fourteenth Amendments.

5. Whether the construction of Penal Code 311 and 311.2, as applied to petitioners, to permit petitioners' convictions without proof of *scienter*, violates the free speech and press and due process provisions of the First and Fourteenth Amendments.

6. Whether the construction of California Penal Code 311 and 311.2, as applied to petitioners, to dispense with proof of knowledge of obscenity and to predicate guilt solely upon alleged circumstantial knowledge of contents of the film in question, violates the free speech and press and due process provisions of the First and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, and the provisions of California Penal Code 311 and 311.2 are set forth in Appendix C attached hereto.

Statement of the Case.

The petitioners on January 2, 1962 were charged in separate, but identical, two-count complaints with violations of §311.2 of the Penal Code of the State of California. It was alleged in the said complaints that petitioners had knowingly distributed certain "obscene matter, to wit; Motion Picture Films at the Oaks Theatre, 85 North Fair Oaks Boulevard" in the City of Pasadena, County of Los Angeles, State of California, in violation of the said statute [C. T. 3, 24].

The cause came on for trial on March 19, 1962 before the Honorable Louis T. Fletcher, a Judge of the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California. By stipulation, the causes were consolidated for trial before the court sitting without a jury. [C. T. 79-80]. The trial was concluded on March 21, 1962. On March 28, 1962, the court found petitioners guilty on Count I of the complaint and not guilty on Count II [C. T. 28, 29]. Petitioner Wenzler was sentenced to 30 days imprisonment, a fine of $500.00 plus a $25.00 penalty assessment, or in lieu thereof 50 days imprisonment [C. T. 8]. Petitioner Inlay was sentenced to 30 days imprisonment, suspended, probation for 3 years, on condition that petitioner commit no further violations of law and obey all laws of the State of California, and to pay a fine of $50.00 plus a penalty assessment of $2.50 [C. T. 29].

How Federal Questions Are Presented.

(a) The petitioner Wenzler at the time of the commission of the alleged offense was the manager of the motion picture theatre known as the Oaks Theatre located in the City of Pasadena [C. T. 226]. Petitioner Imlay was an employee of the theatre [C. T. 128], a doorman and candy counterman [C. T. 131].

At the trial, the case came down finally to the sale of a single reel of film "200 feet 8-millimeter" [C. T. 100] entitled "First Fling" [Peo. Ex. 1, C. T. 100]. The theatre advertised on the screen that patrons could purchase films at various prices at the counter in the lobby [C. T. 95-96]. The aforesaid film and the small carton in which it was contained were purchased by a police officer one afternoon from petitioner Imlay at the theatre [C. T. 95-100].[2] There was no dispute at the trial that "the free speech provisions of the Constitution also applied to motion picture films" [C. T. 56].

(b) With respect to the issue as to whether the prosecution was required to prove that the film in question exceeded contemporary standards in the depiction and representation of sex or nudity, the trial court, after extended argument on the applicability of the decisions of the United States Supreme Court and the

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[2] The trial was conducted under Count I involving only the aforesaid film purchased by the officer. Other films in cartons were seized by police officers, but the search and seizure were attacked as unlawful [C. T. 44-74]. Count II of the complaint purportedly covered such seized films. On a motion to quash the search warrant, the court took the motion under submission and the case proceeded to trial solely under Count I [C. T. 74-75]. At the end of the trial, as aforestated, the court found petitioners not guilty on Count II.

California Supreme Court on the question involved [C. T. 143-160], ruled as follows:

> "Well, so there will not be any misunderstanding and so that your record will be protected, I want to state clearly that in my opinion, the matter of contemporary standards with relation to the average man, average person, as used in the section, that is Section 311.2, or the definition section, may be determined by the Court or by the Jury without the admission of any other outside testimony, after having seen the picture or reviewed the book" [C. T. 159].

The court ruled that the defense might have the opportunity, if they chose, to put on evidence "to establish what the contemporary standards are of the average man" [C. T. 159-160], and the People would "have the right to rebut that" [C. T. 160].

In short, the trial court construed the statute as supporting the view that "the People have put on a prima facia case" [C. T. 153] when the film is placed into evidence and seen by the factfinder. There is thus no burden on the prosecution under the California statute as construed to show that the matter in question exceeds contemporary standards; the burden is solely upon the accused to show that the matter does not.

(c) The offense charged in the complaint was allegedly committed in the City of Pasadena in December, 1961 [C. T. 3, 24]. The petitioners offered to prove that in the year 1961, a Board of Review of the City of Pasadena appointed under a then governing Pasadena ordinance had issued permits for the showing of films

at the Oaks Theatre comparable to the film in question and petitioners offered the films in evidence for viewing by the trial court to demonstrate that the film "First Fling" did not exceed the contemporary standards of the Pasadena community (the very community whose standards were allegedly offended in the depiction and representation of sex or nudity [C. T. 185-205].

The offer of proof, and the evidence, were rejected by the court [C. T. 204]. The court ruled that on the issue of contemporary standards, it was not material that such comparable films had been shown in the same community under permits issued by the community [C. T. 204]. The "only way you can establish the contemporary standards with respect to this [film in question] is to have people who have seen this picture, the average person, who has seen this picture, testify as to what — whether it meets the contemporary standards, or not. We can go days and days seeing hundreds of pictures. It won't help us a bit, Mr. Johnson" [C. T. 204].

It appeared to the trial court that under the decisions of the courts including the United States Supreme Court that the question of contemporary standards was solely one for the court to decide [C. T. 157] based on the testimony of "the average person" with respect to the film in question [C. T. 204]; not on the basis of other films shown in the community.

(d) The film in question represents a woman in progressive stages of disarray and nudity, without however displaying any genital organs, moving about a room and lying on a bed in various positions. The re

is no other person in the film, and there is no sound. In going from one room to the other, the woman appears to make a "come-along" motion to the viewer [C. T. 282-285, 288-291].

The petitioners presented the testimony of expert witnesses [C. T. 278-296], and introduced books, pictures and magazines containing nude figures in different positions and postures sold in establishments in Pasadena and exhibited in libraries and museums therein [C. T. 206-220], all to demonstrate that the film in question clearly did not exceed contemporary standards of the community in the depiction and representation of sex or nudity.

The testimony aforesaid was essentially uncontradicted. The prosecution, in purported rebuttal, offered only the unqualified and subjective opinions of an admittedly hostile former member of the Pasadena Review Board [C. T. 312-314, 315-336] and a police officer [C. T. 337-343, 343-347].

(e) The petitioners testified that they had never seen the contents of the film in question until it was shown at the trial [C. T. 129, 169]. The films sold at the counter in the lobby of the theatre were assumed by the petitioners to be about the same in content as those shown on the screen in the theater [C. T. 129-168]. The films shown on the screen had been frequently checked by police officers without notice to petitioners of any wrongdoing [C. T. 178]. The peti-

tioners had no reason to believe, and did not believe that the comparable film in question was obscene, or that any film exhibited or sold in the theatre was obscene [C. T. 164-170].[3]

The prosecution relied on the circumstantial testimony of police officers in its endeavor to show that petitioners had knowledge of the contents of the film in question [C. T. 80-93, 94-109, 110-124]

On a motion to dismiss after the prosecution rested its case on direct [C. T. 124], the trial court stated that there "doesn't have to be knowledge that the ma-

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[3] In April, 1961, petitioner Wenzler was convicted in the Pasadena Municipal Court of a violation of the Pasadena municipal ordinance making it a penal offense to exhibit an obscene film. Petitioner was placed on probation, the judge directing that police officers make periodic checks of the theatre [C. T. 164]. Thus, all films shown at the theatre prior to the commission of the alleged offense herein had for months been reviewed by the police without notice of violation to petitioners.

At the trial herein in March, 1962, the aforesaid 1961 judgment of conviction, and the film therein involved [Pet. Ex. 5, C. T. 263] were relied on by the prosecution to establish petitioner's alleged guilty knowledge, violation of contemporary standards, and for impeachment purposes. On January 5, 1963, by order of a Judge of the Superior Court of the State of California for the County of Los Angeles, on habeas corpus (*Matter of Wenzler*, Sup. Ct. (1963), H.C. 8830), the said 1961 judgment of conviction was voided, the court holding that petitioner had been unlawfully convicted under an unconstitutional ordinance. Since the void 1961 judgment and exhibit therein were extensively injected into the 1962 trial herein [C. T. 93, 229-230, 252-254, 259-261, 261-264, 264-265], and since the judgment here may rest principally upon the said void and unconstitutional proceedings of 1961, state habeas corpus proceedings were instituted in the California Courts to annul the judgment here upon this new ground which did not arise until 1963 and had not been previously passed upon therefore by the California courts. The petition for a writ of habeas corpus was denied by the California Supreme Court on March 20, 1963. Petitioners intend to petition for a writ of certiorari to this Court so that the additional federal question may be presented along with the questions here presented.

terial is obscene, only knowledge that he is selling them" [C. T. 125]. The court stated: "There might be some people so depraved that no matter what sort of a picture you would show they wouldn't think it was obscene" [C. T. 127]. When petitioner Wenzler testified that the film in question when shown at the trial was in his opinion, based on his experience and knowledge of court opinions, not obscene [C. T. 174-176], the trial court stated: "Well, sir, I think we are more concerned not with what you read in the Supreme Court but what is your moral understanding or moral interpretation of these pictures. Your own character here is somewhat at stake when you are challenged this way, and using your own standard of morality, do you think these are obscene?" [C. T. 176].

(f). At the conclusion of the entire case [C. T. 347], there was extended argument for dismissal [C. T. 348-384] upon all the issues aforestated. Petitioners urged that the said questions involved matters "which the Constitution of the United States zealously guards, that is, the freedom of speech, the freedom of press, and the general freedom of personal expression" [C. T. 354]. Stressing this Court's decisions in "Roth versus United States and Smith versus California" [C. T. 355], petitioners urged that the freedom guaranteed by the Constitution of the United States [C. T. 355, 356] required careful scrutiny of the questions involved.

In pointing to the decisions of this Court interpreting the free speech and due process provisions of the Constitution [C. T. 356-357], petitioners emphasized the constitutional infirmities of the case made against petitioners in the failure to require the prosecution to

prove that the matter exceeded contemporary standards [C. T. 357-359], in the lack of evidentiary support for any finding of guilty knowledge [C. T. 359-366], in the uncontradicted record showing that the film in question did not exceed contemporary standards and was not obscene [C. T. 368-372], and in the fact that the film in question was constitutionally protected material under the First Amendment to the Constitution [C. T. 373-375].

As aforestated, petitioners were found guilty solely on Count I of the complaint, and the judgments of conviction were affirmed by the court below.

Reasons for Granting the Writ.

1. The holding that it is permissible to convict an accused in an obscenity prosecution under the law without proof that the matter in question goes beyond customary limits of candor in description or representation of sex or nudity clearly violates the free speech and press and due process provisions of the Constitution.

In *Alberts v. California*, 354 U. S. 476, 489, this Court made proof that material exceeded "contemporary community standards" a constitutional essential of the offense of obscenity. In *Manual Enterprises, Inc. v. Day*, 370 U. S. 688, Mr. Justice Harlan stated that "essential to a valid determination of obscenity" (*Id.* at 482) is proof that materials are "so offensive on their face as to offend current community standards of decency" (Id. at 482). It was emphasized by Mr. Justice Harlan that without a requirement of proof of the "patent offensiveness" of the challenged material, an obscenity statute "would doubtless encounter constitutional barriers" (*Id.* at 487).

The trial court held that under the California obscenity statute there is no requirement on the part of the prosecution to prove that the material in question goes beyond community toleration. It is left solely to the accused, if he desires, to prove that the material is within the customary area of freedom of expression. If the accused does not assume the burden, conviction may thus follow without any evidence that an essential ingredient of the offense has been committed.

The distributors of books or the exhibitors of particular motion picture films are the persons least likely to involve themselves in costly defenses necessary to establish the literary standards of a community. Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 11 (1960); *Bantam Books, Inc. v. Sullivan*, 83 S. Ct. 631, 636, n6. Placing the burden on distributors and exhibitors to show that the challenged writing or film does not offend a particular community's standards can only discourage and frighten such persons away from any book of film upon which there may be differences of opinion. See, *Smith v. California*, 361 U. S. 147, 152-153; *Marcus v. Search Warrants of Property*, 367 U. S. 717, 729-733; *N. A. A. C. P. v. Button*, 371 U. S. 415, 433; *Bantam Books, Inc. v. Sullivan*, 83 S. Ct. 631.

This Court has stated that where "the transcendent value of speech is involved," due process requires that the State bear the burden of persuasion to show that the accused "engaged in criminal speech." *Speiser v. Randall*, 357 U. S. 513, 526. Since it cannot be rationally argued that an accused in an obscenity prosecu-

tion has more convenient access to proof of contemporary standards than the prosecution, or that requiring an accused to assume the burden of such proof will not subject him to unfairness and hardship, such arguments "from convenience" (*Tot v. United States*, 319 U. S. 463, 469) are not available here. It is submitted that in the light of the free speech and due process provisions of the Constitution governing the standards for judging obscenity, a legislature cannot make the mere reading of a book or the showing of a film sufficient proof of "all the facts essential to guilt" in an obscenity prosecution. *Tot v. United States*, 319 U. S. 463, 469; *Speiser v. Randall*, 357 U. S. 513, 523-526. Without evidentiary support of such essential ingredient of the offense of obscenity as "contemporary community standards" and the extent to which such standards have been exceeded, due process requires that a judgment of conviction be invalidated. *Manual Enterprises, Inc. v. Day*, 370 U. S. 478; *Garner v. Louisiana*, 368 U. S. 157, 163.

2. For undefined reasons, the trial court refused to permit the accused—(upon whom the court had placed the burden of proving that the film in question did not exceed the contemporary standards of the City of Pasadena)—to prove that comparable films had been shown during the same year in the same community, and with permission granted by an official agency of the community acting under the laws promulgated by the community.

The exclusion of such crucial evidence offered by petitioners in this obscenity prosecution was clearly a denial of due process. *Smith v. California*, 361 U. S. 147, 164-167, 171-172. It was a deprivation of any meaningful defense. *Saunders v. Shaw*, 244 U. S. 317; *Hovey v. Elliott*, 167 U. S. 409, 417.

While the court permitted the introduction by petitioners of books, magazines and pictures containing nude figures, the prosecution constantly urged that such evidence had no relevance or materiality because "they are still pictures and magazines, which do not depict any motion or movement, that it is completely different from a motion picture" [C. T. 208]. Yet, when petitioners sought to introduce *comparable motion picture films shown in the very same community by permission of the community in the same year in the same theatre*, the trial court rejected all such testimony on the ground that "it won't help us a bit" [C. T. 204].

Coupled with the ruling that the prosecution was not required to prove that community standards had been exceeded, the refusal to permit petitioners to present significant evidence establishing that the film in question was well within the area of community toleration, deprived petitioners of their liberty without due process of law and abridged the freedoms of speech and press. *Smith v. California, supra.*

3. The film in question is clearly entitled to constitutional protection. The evident purpose of this Court's decision in *Roth-Alberts* was "to tighten obscenity standards" *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 487. That material may seem to officials "dismally unpleasant, uncouth and tawdry" does not make the material "obscene" (Id. at 490). Moreover, not every portrayal of "female nudity is obscene" (*Id.* at 490).

That nudity is not obscenity has frequently been pointed out by the courts. *Manual Enterprises, Inc. v. Day*, 370 U. S. 478; *Mounce v. United States*, 355

U. S. 180; *Sunshine Book Co. v. Summerfield*, 355 U. S. 372; *Times Film Corp. v. City of Chicago*, 355 U. S. 35; *Excellent Publications, Inc. v. United States*, 309 F. 2d 362 (1 Cir. 1962). See, Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 32-35 (1960).

The film herein involved is well within the portrayal of female nudes that society tolerates. The woman in the film does not appear with other persons; the genital areas are not exposed; there is no objectionable language in the film, and generally the film is no more provocative than a great many other films, pictures and photographs seen in motion picture theatres, in displays, in advertisements, museums, book stores and like media and establishments. In the constitutional sense, the film is not obscene. If the constitutional guarantees of freedom of expression are to be applied in such manner as to confine obscenity prosecutions to narrow limits (*Alberts v. California*, 354 U. S. 476, 488), then the judgments of conviction here cannot be constitutionally upheld.

The record here does not show that the film in question went substantially beyond the contemporary standards of the community in the representation of sex or nudity. The only competent evidence in the record shows that the film was well within the area of customary freedom of expression. Without essential evidence of guilt, it was a violation of due process to convict and punish these petitioners. *Thompson v. City of Louisville*, 362 U. S. 199, 204; *Sibbach v. Board of Bar Examiners*, 353 U. S. 232, 246-247.

4. There is no competent proof in the record that petitioners knew the film in question is obscene as charged by the prosecution, although the statute requires such proof. Penal Code 311. The trial court apparently deemed it sufficient if there was proof that petitioners knew the "contents" of the film. Indeed, to the trial court the essential question seemed to be petitioners' "moral understanding or moral interpretation" of the film in question; it appeared that petitioners' "character[s]" were "at stake" in this obscenity prosecution, and petitioners were required to judge the alleged obscenity of the film shown during the trial by their "own standard of morality" [C. T. 176.] Compare, *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495; *Gelling v. Texas*, 343 U. S. 960; *Superior Films, Inc. v. Dept. of Education of Ohio (Commercial Pictures Corp. v. Regents)*, 346 U. S. 587; *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870; *Mounce v. United States*, 355 U. S. 180; *Kingsley Int. Pictures Corp. v. Regents*, 360 U. S. 684.

The record reveals that the only attempt to prove that petitioners knew the "contents" of the film in question was their alleged statements to the police officers that petitioners believed the films sold at the counter were similar to those shown on the screen. Since concededly the films shown on the screen had been under constant review by the police officers under court direction without notice to petitioners at any time of any violation, such evidence could not rationally support a finding that petitioners knew that the film which they never saw was obscene. "Without the knowledge, the intent cannot exist [citation]. Furthermore, to estab-

lish the intent, the evidence of knowledge must be clear, not equivocal." *Direct Sales Co., Inc. v. United States*, 319 U. S. 703, 711.

It is submitted that there is no evidentiary support for a finding of *scienter* in the case herein. Compare: *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 492-495. See also, *Tot v. United States*, 319 U. S. 463, 473; *Speiser v. Randall*, 357 U. S. 513.

In construing the statute to dispense with proof of knowledge of obscenity, and to authorize conviction solely on alleged circumstantial proof of knowledge of "contents," the courts below arbitrarily deprived petitioners of their liberty without due process of law and abridged the exercise of freedoms of speech and press guaranteed by the Constitution. *Thornhill v. Alabama*, 310 U. S. 88, 98; *Smith v. California*, 361 U. S. 147; *Marcus v. Search Warrants of Property*, 367 U. S. 717; *Speiser v. Randall*, 357 U. S. 513; *Tot v. United States*, 319 U. S. 436; *Manley v. Georgia*, 279 U. S. 1; *Bailey v. Alabama*, 219 U. S. 219.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Judgment (Wenzler, Sr.)

In the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Superior Court No. CR A 5058. Trial Court No. M 55985.

People of the State of California, Plaintiff and Respondent, vs. Harold Eugene Wenzler, Sr. Defendant and Appellant.

On Appeal from the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California. Louis T. Fletcher, Judge.

Filed October 30, 1962. William G. Sharp, County Clerk, by J. MacGregor, Deputy.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment made and entered in the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed; the appeal from "decision of guilty" is dismissed.

By the Court,

Swain, Presiding Judge
Huls, Judge
Smith, Judge

APPENDIX B.

Judgment (Imlay).

In the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Superior Court No. CR A 5059. Trial Court No. M 55984.

People of the State of California, Plaintiff and Respondent, vs. John Imlay, aka John Inlay, Defendant and Appellant.

On Appeal from the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California. Louis T. Fletcher, Judge.

Filed October 30, 1962. William G. Sharp, County Clerk, by J. MacGregor, Deputy.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment made and entered in the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed; appeal from "decision of guilty" is dismissed.

By the Court,

Swain, Presiding Judge.
Huls, Judge.
Smith, Judge.

APPENDIX C.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. California Penal Code, §311 provides:

> "As used in this chapter:
>
> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.
>
> "(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechan-

ical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

4. California Penal Code, §311.2 provides:

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

Supreme Court, U.S.
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SUPREME COURT, U.S.

No. 79

Helen's Kitchen, Inc., and [illegible],

Petitioners,

vs.

People of the State of California,

Respondent.

Application to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

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IN THE

Supreme Court of the United States

October Term, 1962
No.....

HAROLD EUGENE WENZLER, SR., and JOHN IMLAY,
Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Opposition to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Respondent prays that a Writ of Certiorari to review the judgment of the Appellate Department of the Superior Court, entered in the above-entitled case on October 30, 1962 be denied.

Statement of the Case.

The petitioners on January 2, 1962 were charged in separate, but identical, two-count complaints with violations of Section 311.2 of the Penal Code of the State of California. It was alleged in the said complaints that petitioners had knowingly distributed certain "obscene matter, to wit: Motion Picture Films at the

Oaks Theatre, 85 North Fair Oaks Boulevard" in the City of Pasadena, County of Los Angeles, State of California, in violation of the said statute [C. T. 3, 24].

The cause came on for trial on March 19, 1962 before the Honorable Louis T. Fletcher, a Judge of the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California. By stipulation, the causes were consolidated for trial before the court sitting without a jury [C. T. 79-80]. The trial was concluded on March 21, 1962. On March 28, 1962, the court found petitioners guilty on Count I of the complaint and not guilty on Count II [C. T. 8, 29].

Jurisdiction.

From judgments of conviction rendered by the Municipal Court of the Pasadena Judicial District in Los Angeles County, State of California, after a joint trial before a court sitting without a jury, petitioners prosecuted their respective appeals to the Appellate Department of the Superior Court of the State of California, County of Los Angeles. The judgments of affirmance by the Appellate Department were dated and entered on October 23, 1962.

Due and timely petitions for rehearing, or in the alternative, for certification of the cases to the District Court of Appeal were denied on November 9, 1962.

By order of Mr. Justice Brennan dated December 18, 1962, the judgments of conviction were stayed pending the timely filing and disposition of a petition for Writ of Certiorari. By order of Mr. Justice Douglas dated January 29, 1963, the time to file the peti-

tion for Writ of Certiorari was extended to April 4, 1963.

Subsequent to the denial of a rehearing and in the alternative for certification to the District Court of Appeal as aforestated, petitioners filed for a Writ of Habeas Corpus No. 8845, in the District Court of Appeal. Said petition was denied on February 18, 1963. Petitioners then filed for a Writ of Habeas Corpus No. 7344, to the Supreme Court of the State of California. The Supreme Court of the State of California denied said petition on March 20, 1963.

In a habeas corpus proceeding, the Supreme Court of the State of California could determine whether petitioners were deprived of their constitutional rights and whether the statute is constitutional.

In re Bell, 19 Cal. 2d 488.

Petitioners attempt to invoke jurisdiction under 28 U. S. C. 1257 (3).

Questions Presented.

1. The first question is improperly and erroneously stated. The prosecution is required to and did prove that the film in question went beyond customary limits of candor in description or representation of sex or nudity, and that the people have the burden to prove that the film exceeds contemporary community standards.

2. In regard to the second question, petitioners were not refused the right to establish contemporary standards, they were granted permission, the evidence was admitted and there was no violation of free speech, press, or due process.

3. The film in question being competent evidence, clearly shows that it exceeds the customary limits of candor in description or representation of sex or nudity.

4. If the film is found to be obscene, then it is not constitutionally protected.

5. Petitioners' convictions were based upon proof of scienter.

6. The knowledge of obscenity of the film was established by direct and circumstantial knowledge of the contents by both defendants.

Federal Questions.

(a) Free speech provision of the Constitution is not applicable if the film is obscene.

(b) The film being so patently obscene could conceivably establish a prima facie case. However, it does not follow as petitioners claim, that the burden is solely on the accused to show that the matter does not exceed contemporary standards.

(c) Other competent evidence was admitted to establish the contemporary standards.

(d) The other films shown and introduced into evidence on the question of exceeding contemporary standards, were not as obscene as Exhibit 1. The film in question has no title to it, no sound, no plot, nothing but a woman in progressive stages of disarray and nudity making erotic motions and appealing to prurient and lewd desires. The record clearly shows, as set forth in this

petition, that there was testimony and evidence on both sides pertaining to the question of contemporary standards. (Petition for Writ of Certiorari, p. 9, Pars. 2 and 3.)

(e) Although petitioners may not have seen the film in question until it was shown at the trial, the evidence established that they knew the contents and Wenzler stated that he was responsible and had viewed one of these films and that they were all similar, or words to that effect.

What Is Obscene Is a Question of Fact.

Defendants offered into evidence pictures, magazines, etc. [C. T. 167-170], attempting to establish contemporary standards. They also offered testimony by men from Los Angeles who have been in the motion picture field [C. T. 234-240] and [C. T. 242-252]. To the effect that Exhibit 1 was not obscene because the genital organs were not shown.

Defendant in his brief to the Appellate Department claimed "that the experts called by the prosecutor in rebuttal of the experts of the defendants were unreliable and their testimony should be discounted." [C. T. 293-292] and [C. T. 294-296].

Although the judge earlier in the trial did not believe it necessary to permit other evidence on the question of contemporary standards, the court changed its mind and permitted other films, books, pictures and testimony to establish contemporary standards. (Petitioners refer to the evidence thus admitted in the Petition for Writ of Certiorari, page 9, Paragraphs 2 and 3).

We respectfully submit that the trial court was in the best position to make a determination as to the reliability, credibility and value of the testimony.

Reasons for Denying the Writ.

I.

There was creditable evidence of what the contemporary standards were on December 19, 1961, based upon the testimony of witness, Richard Hubbell, who has been a Pasadena resident since 1923 and a member of the Pasadena Board of Review for four and one-half years (said Board being the official body to view and pass upon motion pictures shown in Pasadena); and upon the testimony of Lt. Gerald Wright, who has been with the Pasadena Police Department for nineteen years, who stated his qualifications were based upon having seen many films, conversations with law enforcement officials with legal officers of Pasadena and from reading discussing decisions of State and Federal Courts with legal representatives.

Both of the above witnesses testified that in their opinion, the film was obscene.

II.

The prosecution proved that the defendants had knowledge of the nature of the film [Ex. H].

It was established that Defendant Wentzler was the owner and manager of the Oaks Theater at 85 North Fair Oaks Avenue, Pasadena, California, and that John Imlay was his employee.

Officer Harrel testified that he purchased people's Exhibit I from John Imlay at the said theater on December 19, 1961. Imlay testified that he had been

working at this theater for about a year, that he admitted going in and out of the theater; and that he told Officer Harrel that People's Exhibit I was the same or similar to the films that are being shown inside this theater.

Defendant Wenzler testified that he had viewed part of a similar film and ordered them; that he viewed one of the group of films he received at a friend's house and didn't think it was obscene. Upon viewing the People's Exhibit I, he did not believe it was obscene. He told Lt. Wright that the films being sold at the candy counter are approximately the same as those shown on the screen inside; and that he was the responsible person for showing and selling these films.

Judge Fletcher, in finding the defendants guilty, established that there was sufficient creditable evidence that they knew the nature of the films and that in the Court's opinion, People's Exhibit I was in fact "obscene."

The People rely on the film in answering Appellant's contentions pertaining to whether or not this film is "obscene" as defined by statute and case law.

The petitioners introduced into evidence over the objection by the People, pictures and photographs of nude and semi-nude persons, which were purchased from certain locations in the community. The objection was based on the fact that they were not comparable to the suggestive movements and offensive demeanor shown on the film.

The fact that there may be other or similar violations would not make the film less obscene.

People v. Wenzler, 78 Cal. App. 2d 930, 932 (1947).

III.

The People concur that "knowingly" is an element to be proven as indicated by section 311.2 of the Penal Code. Here, the facts and evidence established the knowledge of the defendants as to the nature of the films in their possession. Scienter is knowledge of the contents. The question of "intent" as set forth in the statute requires proof of "intent to distribute or to exhibit, or offer to exhibit" the films in their possession, and this was also established by the evidence.

People v. Harris, 192 Cal. App. 2d 887, 892.

IV.

The question of whether or not the film was "obscene" was a question of fact for the Court to determine.

People v. Smith, 164 Cal. App. 2d 800.

The statute is sufficiently explicit as to what it proscribes and it is constitutionally sound.

The Defendant, Wenzler, testified as to his extensive knowledge of the motion picture industry and film distribution, particularly in the field of suggestive and erotic films. Likewise, the alleged "experts" for the Petitioners, who do not reside in the Pasadena Community and who had not seen the People's Exhibit I, testified that in their opinion an "obscene" film would be one which shows the entire body in a lewd manner and showing sexual relations on the film. We do not believe that these are the "average persons" who could establish a "standard" for the Community.

It was for the Court to determine from all the evidence, applying contemporary community standards, whether or not petitioners were guilty.

The People contend that the Court properly determined, applying the contemporary community standards, that, to the average person in the community, the dominant theme of the film, People's Exhibit 1 in evidence taken as a whole, appeals to prurient interest, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

Conclusion.

For the foregoing bases and reasons the petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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